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In the Supreme Court of the United States

OCTOBER TERM, 1957

DONOVAN CONSTRUCTION COMPANY, AND JAMES CONSTRUCTION COMPANY, A JOINT VENTURE, DOING BUSINESS AS DONOVAN-JAMES COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Contract provisions involved	2
Statement	2
Argument	3
Conclusion	7

CITATIONS

Cases:

Carnegie Steel Co. v. *United States*, 240 U.S. 156	3
Continental Illinois Bank v. *United States*, 121 C. Cls. 203, certiorari denied, 343 U.S. 963	6
Day v. *United States*, 245 U.S. 159	3
Perry v. *United States*, 294 U.S. 330	6, 7
Severin v. *United States*, 99 C. Cls. 435, certiorari denied, 322 U.S. 733	6
United States v. *Gleason*, 175 U.S. 588	3
Wells Bros. Co. v. *United States*, 254 U.S. 83	5

Miscellaneous:

6 Corbin on *Contracts*, 311	3

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1-21) is reported at 149 F. Supp. 898.

JURISDICTION

The judgment of the Court of Claims was entered April 3, 1957. The petition for a writ of certiorari was filed on June 28, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below erred in holding the United States not liable to its contractor for flood damage occurring to a subcontractor during construction of a steel tower transmission line.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contracts are referred to in the Argument, *infra*, pp. 4-6.

STATEMENT

On February 21, 1950, petitioner entered into a contract with the United States to erect a steel tower transmission line in Sacramento County, California (Pet. App. 6). On March 24, 1950, petitioner entered into a subcontract with the partnership of Carrieco and Gautier under which the subcontractor was to perform the actual work on the project (Pet. App. 13-14).

After work had begun, a severe storm occurred which caused streams rising in the Sierra Nevada Mountains to become swollen. On November 19, November 21, and again on December 4, 1950, one of these, the American River, overflowed and flooded the area where the construction work was in progress. The flood damaged the contract work (Pet. App. 7).

Petitioner reported the flood damage, requested an extension of time in which to perform, and claimed additional compensation because of the conditions created by the flood (Pet. App. 7-8). On January 15, 1951, petitioner was advised that its claim for additional compensation would be considered after completion of the contract (Pet. App. 8-9). After completion of the contract, petitioner filed a written claim for $39,739.63 as compensation for costs arising from the flood damage (Pet. App. 9). On October 11, 1951, the contract-

ing officer denied this claim (Pet. App. 9-10). Petitioner appealed this decision to the Secretary of the Interior, and, on July 9, 1952, the Solicitor of the Department of Interior, acting for the Secretary, affirmed the ruling of the contracting officer (Pet. App. 10).

Included in petitioner's claim for compensation was the sum of $21,150.60 claimed by the subcontractor for additional costs incurred as a result of the flood, which the subcontractor was claiming from petitioner (Pet. App. 13, 17). After final denial of its claims, petitioner filed this action for the use and benefit of its subcontractor (Pet. App. 17).

On April 3, 1957, the Court of Claims dismissed petitioner's suit. It ruled that the petitioner could sue in its subcontractor's behalf but that it could not recover because the prime contract does not make the United States "accountable for the repair of damage which happens not to be the fault of the contractor" (Pet. App. 5).

ARGUMENT

1. It is a familiar rule of contract law that one who binds himself to construct an object assumes the burden of losses from unforeseen difficulties which arise in the course of performance. See *e.g.*, *Day* v. *United States*, 245 U.S. 159; *Carnegie Steel Co.* v. *United States*, 240 U.S. 156, 164; *United States* v. *Gleason*, 175 U.S. 588, 602. See, also, 6 Corbin on *Contracts*, 311.

Thus, in the absence of an express undertaking to the contrary, the United States would owe no obligation to petitioner to compensate for damage to the project occasioned by flood during the course of construction. And there is, in this case, no such express undertaking. In fact, the provisions of the contract

affirm that petitioner assumed the risk of loss. Under Article 10 (Pet. App. 10), petitioner agreed to "be responsible for all materials delivered and work performed until completion and final acceptance." Again, in Article 16 (Pet. App. 10), dealing with the effects of partial payments, it was expressly stipulated that the transfer to the Government of title to work covered by partial payments was not to "be construed as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made, or the restoration of any damaged work." Similarly, in Paragraph 25 of the specifications (Pet. App. 11), the contractor accepted full responsibility for all Government-furnished materials delivered for use in the project. These provisions plainly assign the risk of loss, from damage to the project, to the petitioner.

Petitioner seeks to overcome the force of the language of the contract by arguing that the term "responsible", as used therein, is not equivalent to "liable", and that there somehow follows from this asserted distinction a right to recover compensation for additional work caused by the flood. There is little merit in this argument. The term "responsible", as generally understood, would place upon petitioner the risk of additional costs made necessary by unforeseen interruption or mishap. However, even if some substance could be attributed to petitioner's argument, it would at most do no more than counterbalance the express contractual language. There would remain intact the general rule of law, applicable in contractual situations of this type, which places the risk of loss upon the builder, here the petitioner.

Petitioner also urges that it did not assume the risk of loss because the construction work was performed

on Government-owned land with Government-owned materials. But construction normally takes place on land owned or controlled by the party who has contracted for improvements; and petitioner expressly accepted responsibility for the materials entrusted to it. Having agreed to construct a steel tower transmission line with materials furnished by the Government on land owned by the Government, petitioner cannot now re-write its contract to cover difficulties which it failed to anticipate. See *Wells Bros. Co.* v. *United States*, 254 U.S. 83, 87.

2. (a). If it be assumed that the United States undertook, as a matter of contract, to compensate petitioner for loss to it occurring during the course of the work, there could nevertheless be no recovery in this case. As indicated above, *supra*, p. 2, the project was wholly performed by a subcontractor, not in privity with the United States. The same principle of law set forth above, *supra*, p. 3, applies to the relationship between the petitioner and its subcontractor. Absent an express agreement to the contrary, the risk of loss fell on the subcontractor. And, again, the express provisions of the subcontract affirm, rather than vary, the general rule.

Article IV of the subcontract (Pet. App. 14) requires the subcontractor to "save the Contractor harmless from any liability for damage to the said work." This provision represents an assumption of the risk of any loss which would impose legal liability on the contractor. Even if there were no such liability, however, the subcontractor has expressly agreed to accept certain unit prices as full compensation for doing the work and "for all loss or damages arising out of the nature of the work * * *, or from the action of the ele-

ments, or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work" (Pet. App. 17).

Where, as here, general principle and clear contractual language show the absence of liability running from the prime contractor to the subcontractor, the prime contractor has no standing to sue for losses suffered by the subcontractor. In other words, the prime contractor has standing to sue only where it suffers actual damage, *i.e.*, on the assumption that the prime contractor itself does (as is not the case here) stand to bear the risk of loss. *Severin* v. *United States*, 99 C. Cls. 435, 442-444, certiorari denied, 322 U.S. 733; *Continental Illinois Bank* v. *United States*, 121 C. Cls. 203, certiorari denied, 343 U.S. 963. This rule of general contract law conforms to and is supported by the rule that, in order to maintain suit in the Court of Claims against the United States, a plaintiff must sue for actual damages. See *e.g.*, *Perry* v. *United States*, 294 U.S. 330, 354-5.

(b). As indicated by the foregoing discussion, petitioner, assuming it had the right to sue the United States for damage suffered *by it* during the course of construction, had no such right of recovery stemming from the relationship between it and its subcontractor. On this point, however, the Court of Claims ruled, contrary to our view, that petitioner was liable to its subcontractor for extra work. It reached this result by giving conclusive force to a provision of the specifications of the subcontract which provided that the liability of the prime contractor to the subcontractor, with respect to extra work, depended on whether or not the prime contractor succeeded in receiving payment from the Government (Pet. App. 3). Under this formula,

the requisite liability of the prime contractor to the subcontractor need arise only *after* payment of judgment by the United States to the prime. This holding is purely circular. It says, in substance, that the liability upon which the jurisdiction of the Court of Claims depends need arise only after jurisdiction has been exercised to create the liability. But, as noted above, there is no standing to bring a suit in the Court of Claims if actual damage has not already been suffered by the plaintiff. *Perry* v. *United States, supra.*

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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